83 - 1763

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO.

DAVID LLAGUNO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Burton Joseph
134 N. LaSalle Street
Chicago, Illinois 60602
(312) 346-9270

Joseph A. Ettinger
Rick M. Schoenfield
Ettinger & Schoenfield, Ltd.
180 N. LaSalle Street
Chicago, Illinois 60601
(312) 782-8435
Attorneys for Petitioner

QUESTIONS PRESENTED

I. Where the defendant was only told that the government's witness took dynamite from the coal company where the witness worked was it improper for a conviction to be rendered since it was not proven beyond a reasonable doubt that the defendant knew or had reasonable cause to believe that the dynamite was stolen which is an essential element of the crimes charged?

II. Where the prosecution at trial insinuated that the defendant was involved in a bombing in Chicago, a crime he was not charged with, was it improper for a conviction to be rendered since the defendant was prejudiced?

III. Where the district judge misstated the law by implying that whether the defendant was merely present during a conversation was crucial to deciding the

case, was it improper for a conviction to be rendered since mere presence during a conversation is insufficient to support a conviction?

IV. Where the district judge clearly indicated that he did not believe an important witness whose testimony was favorable to the defense, was it improper for a conviction to be rendered since those indications prejudiced the defendant?

TABLE OF CONTENTS

II. Was it error to convict the defendant where the government insinuated at trial that the defendant was involved in a bombing in Chicago, a crime that he was not charged with, which prejudiced the defendant?

III. Was it error to convict the defendant where the district judge stated during trial that whether the defendant was merely present during a conversation was crucial to deciding the case where case law clearly holds that mere presence during a conversation is insufficient to support a conviction?

IV. Was it error to convict the defendant where the district judge clearly indicated that he did not believe an important witness whose testimony was favorable to the defense which prejudiced the

TABLE OF AUTHORITIES CITED

CASES

CONSTITUTIONAL AND STATUTORY PROVISIONS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

NO.

DAVID LLAGUNO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, David Llaguno, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The opinion of the Court of Appeals below (Appendix p.1a)

was not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered February 29, 1984. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes under which Petitioner was prosecuted were as follows:

1. Title 18, United States Code, Section 371.

§ 371. Conspiracy to commit offense or to defraud United States

"If two or more persons conspire either to commit any offense against the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five

years, or both..."

2. Title 18, United States Code, Section 842(h).

"(h) It shall be unlawful for any person to receive, conceal, transport, ship, store, barter, sell, or dispose of any explosive materials knowing or having reasonable cause to believe that such explosive materials were stolen."

Title 18, United States Code, Section 842(a)(3)(A).

§ 842. Unlawful acts

(a) It shall be unlawful for any person--(3) other than a licensee or permittee knowingly---

(A) to transport, ship, cause to be transported, or receive in interstate or foreign commerce any explosive materials, except that a person who lawfully purchases explosive materials from a licensee in a State contiguous to the State in which the purchaser resides may

ship, transport, or cause to be transported such explosive materials to the State in which he resides and may receive such explosive materials in the State in which he resides, if such transportation, shipment, or receipt is permitted by the law of the State in which he resides.

STATEMENT OF THE CASE

A. Course of Proceedings

On March 10, 1983, in a cause then pending in the United States District Court for the Southern District of West Virginia, Charleston, entitled United States of America v. David Llaguno, Criminal Number 83-20008-02, Petitioner was found guilty by a jury on an indictment of three counts charging violations of 18 U.S.C. §§ 371, 842(a)(3)(A), and also 842 (h). More specifically, Count I of the indictment alleged a conspiracy to receive, concel, transport,

ship, store, barter, sell and dispose of explosive materials knowing and having reasonable cause to believe that such explosive materials were stolen. Count II alleged that petitioner and Roy Maldonado aided and abetted by each other, committed the substantive offense referred to in the conspiracy charge. Count III charged that the Petitioner and Maldonado, aided and abetted by each other, knowingly transported and caused to be transported in interstate commerce from West Virginia to Illinois ten sticks of dynamite without a license or permit.

The defendant sought a judgment of acquittal notwithstanding the verdict and, alternatively, a new trial. On April 6, 1983, his motion was denied in a written order.

On May 2, 1983, Petitioner was sentenced to imprisonment for a period of

five years on Count I and a period of five years probation on each of Counts II and III. The probationary period imposed under Counts II and III are concurrent with each other, but consecutive to the five year prison term. Defendant appealed his conviction to the United States Court of Appeals for the Fourth Circuit.

On February 29, 1984, the United States Court of Appeals for the Fourth Circuit affirmed the District Court judgment. (Appendix p.1a)

B. Relevant facts concerning the underlying conviction.

Five witnesses testified at the trial. The Daniels brothers, Charles and William, were indicted as co-conspirators, pled guilty and testified for the government. (R. 6, 50 and 116) An Indiana State Trooper also testified for the government. David Llaguno testi-

fied on his own behalf. Both sides called Louis Roy Roberts, Jr. to testify.

David Llaguno, his brother Roger, Roger's girlfriend Sylvia, Roy Maldonado, Maldonado's wife Cecillia, and Charles Daniels drove from Chicago to Bradshaw, Virginia. (R. 37) The Llaguno's and the Daniels had grown up in the same neighborhood in Chicago. (R. 36 and 103). According to Charles Daniels, he, David and Roger Llaguno were all at a party just before they went to West Virginia. (R. 44) Roberts stated that there were about 20 people at the party, standing, talking and drinking beer. (R. 213 and 215) Charles Daniels claimed that David and Roger Llaguno wanted dynamite and that he told them that in exchange for a ride to West Virginia he would get them dynamite. (R. 44-45)

In West Virginia the group went to the Daniels' parents' home. (R. 46-47) William Daniels arrived there about an hour later. (R. 47) According to Charles Daniels when William arrived Charles asked about getting dynamite and the two of them drove to a barn with David where William handed a bag of dynamite to David and a bag of blasting caps to Charles. (R. 47) According to William, however, at first he did not remember that he had any dynamite. (R. 110 and 121-122) He said that after he remembered, he, Charles and David walked to a shed to see if the dynamite was still there. (R. 111) William had put the dynamite in a shed in August and he did not even know if it was still there. (R. 110-111) William mentioned only one bag and said that he was holding it. (R. 111) Charles said that Roy Maldonado, Roger and the two women drove over to

the barn, but William said that he, Charles and David walked to where the others were. (R. 47 and 111) William said that he gave the bag of dynamite to either Maldonado or Roger. (R. 112) William did not refer to them by name, but as the two Spanish men who were with David. (R. 112) Only Charles initiated any talk about dynamite and only Charles asked William for dynamite. (R. 127, R. 131 and 133)

William testified that David asked him where he had gotten the dynamite. (R. 112) William's response was that, "I took it from work." (R. 112) William Daniels never told the defendant that he had stolen the dynamite. (R. 126) Nor, did William tell David or the others the nature of his job at the coal company. (R. 126-127) William conceded that David and the others had no way of knowing whether William was the general manager,

an underground foreman or the supply house man. (R. 126-127) William admitted that when he said that he took the dynamite from work that David and the others could have assumed that William was permitted to take the dynamite from work. (R. 127) Nor, did Charles Daniels claim that he told the defendant that the dynamite was stolen. Indeed, William Daniels testified that his brother did not even know that he had any dynamite in his possession until he came to their parents' home and found his brother and the others there. (R. 112-113) William Daniels testified that the only reason he knew for David and the others to come to West Virginia was to bring Charles there because Charles did not have enough money to get home. (R. 137-138) William testified that he left his parents' home approximately 20, and no more than 30 minutes after

he arrived. (R. 109)

William Daniels stole ten sticks of dynamite and blasting caps from the coal company where he worked in August, 1979. (R. 106) He explained that he took them by chance one day instead of returning them to storage after they had been issued, but had not been used. (R. 106-107) He testifed that he took the dynamite so that his father could use it to get coal out of the hill where they lived for fuel. (R. 118-119) Obtaining coal by dynamiting is a common practice where the Daniels lived. (R. 142) William Daniels never spoke to his brother, the defendant or anyone else about stealing dynamite before he did so. (R. 121) There was no plan or agreement to steal dynamite until he saw his brother and the others at his parents' house. (R. 121) William had not seen or talked to David in the previous nine

years since they had been in sixth grade. (R. 121 and 138-139)

When Louis Roy Roberts, Jr. testified, defense counsel expressed concern at a sidebar conference that the government intended to ask about other crimes. (R. 200) The district judge responded that the government should ask about the alleged plan of the conspiracy. (R. 200) The government answered that it would ask about statements made by the defendant to the witness concerning the alleged conspiracy. (R. 200) Nevertheless, the prosecutor asked Roberts if he remembered being asked in the Grand Jury, "are you aware of a bombing on the South side of Chicago in January?" (R. 206) This was preceded by questions concerning the last time that Roberts had seen the defendant. (R. 206-207) An objection was sustained and the jury was ordered to disregard the question. (R. 207 &

219-220) Although a motion for a mistrial was denied, the court admonished the prosecutors that they had violated their agreement with the defense. (R. 209) The district judge also stated that the subject was "highly prejudicial" and of "very little probative value." (R. 209)

David Llaguno testified and stated that he did go to Bradshaw, West Virginia with his brother, Roger's girlfriend, Roy Maldonado and his wife, and Charles Daniels. (R. 188 and 192) He stated that for reasons unknown to him, his brother Roger wanted dynamite. (R. 189) David testified that William Daniels said that the dynamite belonged to William. (R. 192) David stated that he was not told that the dynamite was stolen and that he had no reason to believe that it was stolen. (R. 192) The defendant said that no money changed hands and that the dyna-

mite was given to Roger by William Daniels. (R. 189)

David Llaguno testified that William Daniels said that the dynamite was old, sweaty and unstable so that it might blow up without warning. (R. 190) Because of those statements David explained that after they had gone a short distance, he insisted that they stop the car and throw the dynamite away. (R. 190) David said that they did throw the dynamite away in the hills while they were still in West Virginia. (R. 191)

One night in the fall of 1979 Louis Roy Roberts, Jr., the defendant, Roger Llaguno and Charles Daniels were among a group of some twenty friends who were in a park drinking beer. (R. 204-205 & R. 215) At this time Charles Daniels talked about going to West Virginia to get explosives from his brother. (R. 204-205 and R. 212-214) Everyone was talk-

ing at the same time. (R. 215-217) Not everyone was listening to Charles Daniels. (R. 218) Roberts did not know whether David Llaguno was involved in the conversation with Charles Daniels. (R. 213-215 and 217-218) Roberts never saw the defendant with any dynamite. (R. 216) Roberts thought that he saw the defendant the next day. (R. 205-206) Roberts thought that dynamite had been brought back from West Virginia, but all of his information came from Charles Daniels. (R. 212 and R. 215-216)

The district judge asked Roberts a number of questions some of which concerned the involvement, if any, of the defendant in the conversation in which Charles Daniels talked about going to West Virginia to get dynamite. (R. 214-215) The judge stated that whether David Llaguno was part of that conversation was important. (R. 214-215) At

the end of Roberts' testimony the district judge also asked Roberts whether he understood that he had sworn to tell the truth, whether he understood that he could be prosecuted if he lied and whether he wished to reconsider or correct or add anything to his testimony. (R. 219-220)

REASONS FOR GRANTING THE WRIT

A. WHERE THE DEFENDANT WAS ONLY TOLD THAT THE GOVERNMENT'S WITNESS TOOK DYNAMITE FROM THE COAL COMPANY WHERE THE WITNESS WORKED, THE EVIDENCE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANT KNEW OR HAD REASONABLE CAUSE TO BELIEVE THAT THE DYNAMITE WAS STOLEN.

It is clear that an essential element of Counts I and II was that the Petitioner knew or had reasonable cause to believe that the dynamite was stolen. 18 U.S.C. § 842(h). Yet, there was no evidence which proved that David Llaguno knew that the dynamite was stolen. Charles Daniels merely testified that he told David, "If you give me a ride I will get all the dynamite that you want. My brother doesn't pay for it anyway." (R. 45) William Daniels test-

imony was equally vague. William Daniels testified that he told David Llaguno that he "took it (the dynamite) from work." (R. 112) William Daniels, himself, conceded that when he said that he took the dynamite from work that it might be assumed that he had legally taken the dynamite (R. 127) No one claimed that petitioner was ever told that the dynamite was stolen. (R. 126)

Further, it should be noted that it is not illegal to possess dynamite in West Virginia. Moreover, where the Daniels live, it is common for individuals to possess and to use dynamite for legitimate purposes. (R. 142) Thus, it was entirely reasonable for David Llaguno to believe that the dynamite was not obtained illegally.

As a matter of law, "took" does not mean "stole". United States v. Harris, 346 F.2d 182 (4th Circ., 1965); United

States v. Roach, 321 F.2d 1 (3d Circ., 1963). In both Harris and Roach, the indictment charged the defendant with knowingly and unlawfully possessing and concealing money knowing the money to have been "taken" from a bank or savings and loan. Consequently, the convictions in Harris and Roach were reversed on the basis that the indictment failed to charge an offense.

The significance of Harris and Roach is underscored by the fact that this Court has held that convictions are not reversed merely because indictments are technically flawed. Russell v. United States, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed 240 (1962)

> It is enough to sustain an indictment that an offense be described with sufficient clearness to show a violation of law, and to enable the accused to know the nature and

> cause of the accusation and to plead the judgment, if one be rendered, in bar of further prosecution for the same offense. United States v. Behrman, 258 U.S. 280, 288, 42 S.Ct. 303, 304, 66 L.Ed. 619 (1922).

Thus, an indictment need not use statutory language, but only has to use "words of similar import". United States v. Martell, 335 F.2d 764, 765 (4th Cir. 1964), quoting with approval, Finn v. United States, 256 F.2d 304, 306 (4th Cir. 1958); United States v. Chunn, 347 F.2d 717 (4th Cir. 1965).

Thus, the Fourth Circuit in Harris and the Third Circuit in Roach have implicitly held that taken does not have a similar import to stolen.

Since the only evidence regarding Llaguno's knowledge of how the dynamite was obtained would not be sufficient to

state an offense if alleged in the indictment, then it cannot be sufficient to prove the allegations of Counts I and II in the present case. If saying, "taken" in an indictment does not inform a criminal defendant that something was allegedly "stolen," then surely saying "took" in a conversation could not, as a matter of law, inform David Llaguno that the dynamite was stolen. Accordingly, the convictions under Counts I and II should not be allowed to stand.

B. THE DEFENDANT WAS PREJUDICED WHERE THE PROSECUTION INSINUATED THAT HE WAS INVOLVED IN A CRIME THAT HE WAS NOT CHARGED WITH, A BOMBING.

When Roberts testified for the government he was asked by the prosecutor whether he had seen the defendant in February and March of 1980. (R. 206) When Roberts said no, the prosecutor attempted to get Roberts to change his testimony by referring to what may have been prior Grand Jury testimony by Roberts regarding seeing David Llaguno at a party during that time. (R. 207) Roberts was then asked if that refreshed his recollection and he said no. (R. 207)

At this point the prosecutor was inquiring into an irrelevant subject, whether Roberts saw the defendant months after the acts alleged in the indictment. The prosecutor was also improperly try-

ing to "refresh" the witness' recollection without establishing that Roberts' recollection was exhausted. See NLRB v. Hudson Pulp and Paper Corp., 273 F.2d 660 (5th Cir. 1960). Moreover, the prosecutor did not establish that the questions and answers that he was reading had in fact been asked and answered.

While the foregoing may have been harmless error the prosecutor then asked if Roberts remembered being asked:

> Are you aware of a bombing on the South side of Chicago in January? (R. 207)

This was clearly improper and extremely prejudicial. The unmistakable implication was that David Llaguno was involved in a bombing in Chicago.

Evidence that a defendant has committed crimes other than what he is charged with is normally not admissible. Fed. R. of Ev. 404(b). Even if such evidence meets a threshhold test of relevancy because

it is probative of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident it is still not admissible unless the probative value outweighs the risk of substantial danger of undue prejudice. Fed. R. of Ev. 404(b); United States v. DiZenzo, 500 F.2d 263 (4th Cir., 1974). In considering whether the probative value is outweighed by the danger of prejudice, the relevance of the evidence, the need for the evidence and the reliability of the evidence can all be considered. DiZenzo, supra.

The question posed by the government failed to meet even the threshhold test of relevance, much less the second requirement that probative value outweighs the risk of prejudice. Linking the defendant to a bombing that occurred months after the occurrences alleged in the indictment to refresh a memory that

was not shown to be exhausted or to impeach concerning a conversation which purportedly also occurred months after the alleged crimes has no relevance and no probative value.

The district judge found that if there was any probative value it was clearly outweighed by the prejudicial effect. He stated that:

> (T)his has a highly prejudicial effect to the defendant. It may have some probative value, but this is a rebuttal case on the defendant charged for the three crimes that he is here charged on. (R. 209)

After the prosecutor informed the district judge what the answer to the question was supposed to be the judge found:

> That it still has a great deal of prejudicial effect and very little probative value. (R. 209)

The impropriety of the prosecutor's conduct was made even worse by the fact that it violated an agreement not to raise other crimes evidence. (R. 200)

Although the prosecutor claimed that she had misunderstood the agreement, neither defense counsel nor the district judge had any doubt that the prosecutor had agreed not to attempt to use other crimes evidence. (R. 208)

The extreme prejudice caused by other crimes evidence has been clearly established. In United States v. Vargas, 583 F.2d 380, 387 (7th Cir. 1980) the court stated that:

> (I)t is well recognized that evidence of a prior crime or of criminal propensity is particularly prejudicial error.... Recognizing the uniquely harmful aspects of such evidence, we have found reversible error based on overemphasis of prior criminal conduct even when that conduct has been admitted for a proper purpose.

In the present case, the seriousness of the other crime as well as the fact that the alleged crimes involved dynamite and the other crime was a bombing also increase the prejudicial effect. The re-

lationship between the alleged crimes and the other crime is significant. For example, in United States v. Harris, 331 F.2d 185 (4th Cir. 1964) a conviction for possession of untaxed whiskey was reversed because of evidence of the defendant's reputation as a liquor law violator.

Although the district judge sustained an objection to the prosecutor's question and instructed the jury to disregard it, that did not cure the prejudicial effect of the question because the reference to a bombing was so extremely prejudicial. In United States v. Silver, 374 F.2d 828 (7th Cir. 1967) the court stated that:

> (T)he general rule of course is that evidence that an accused has committed another crime is inadmissible, and that any error in admitting such evidence cannot always be cured by sustaining objections or by instructions. 374 F.2d at 830.

All experienced lawyers recognize that once the jury has heard something inflam-

atory it cannot be erased from their minds as if they were machines rather than people despite instructions to disregard and the jury's good faith efforts to do so. This fact has long been recognized by the Supreme Court. In Krulewitch v. United States, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed 790 (1949) the court noted that:

> The naive assumption that prejudicial effects can be overcome by instructions to the jury...(citations omitted) all practicing lawyers know to be unmitigated fiction.

Given the totally improper suggestion by the prosecutor that David Llaguno was involved in a bombing and the extremely prejudicial effect of that suggestion it is clear that Llaguno's right to a fair trial was prejudiced. Accordingly, his convictions should not be permitted to stand.

C. WHERE THE DISTRICT JUDGE MISLED THE JURY INTO BELIEVING THAT WHETHER THE

DEFENDANT WAS MERELY PRESENT DURING A CONVERSATION WAS CRUCIAL TO DETERMINING GUILT OR INNOCENCE THE DEFENDANT WAS PREJUDICED.

The district judge conducted his own questioning of Louis Roy Roberts, Jr. (R. 214-216 and 219-220) During his examination of Roberts the district judge commented that it was "very important" whether the defendant heard and was part of the conversation in the park in Chicago in which Charles Daniels talked about going to West Virginia to get dynamite. (R. 214) The judge then asked whether Roberts wanted to leave the impression that David Llaguno "was a part of the plan to go to West Virginia and pick up the dynamite.." (R. 214) The judge also asked if the defendant was in the park and part of the conversation about dynamite with Charles Daniels. (R. 215) When Roberts re-

sponded that he "guessed so", the district judge then said:

> It is rather important. He either was there or wasn't there. If you are not certain that he was there you shouldn't say he was. (R. 215)

Roberts then said that he did not remember. (R. 215)

The district court's statements that it was very important whether David Llaguno was present when Charles Daniels allegedly talked about going to West Virginia to obtain dynamite made that factual question crucial to the jury's determination of the case. Those statements said, in effect, that if the defendant was present in the alleged conversation then he was guilty of Counts I and II. This was totally incorrect and prejudiced the defendant in two ways.

First, nothing was said in that alleged conversation regarding the dynamite being stolen. Thus, even if David

Llaguno participated in the conversation and agreed to actively participate in going to obtain dynamite he would not have violated any law. See Section A, supra. Accordingly, the jury was given the impression that the defendant could be found guilty in the absence of evidence to prove an essential element of the charges.

Second, when the district court stressed the importance of the defendant's mere presence at the alleged conversation it totally misstated the law concerning accountability. This subjected Llaguno to being convicted based upon guilt by association. That, of course, is "a thoroughly discredited doctrine," Uphaus v. Wyman, 360 U.S. 72, 79, 79 S.Ct. 1040, 1046 (1958). In reversing convictions due to insufficient evidence Courts have held that:

> Mere presence at the perpetration

> of a crime is not criminal. United States v. Paige, 324 F.2d 31, 31 (4th Cir. 1963).

and that:

> To convict...as an aider or abetter the prosecution had to show conduct...amounting to counselling or other assistance...United States v. Honeycutt, 311 F.2d 660, 662 (4th Cir. 1962).

Thus, in United States v. Swann, 377 F. Supp. 1305 (D.Md. 1974) the court held that mere association with a guilty party or mere presence at the scene of a crime does not prove aiding and abetting.

David Llaguno was charged with aiding and abetting. The district court's comments misstated the law and erroneously encouraged the jury to find the defendant guilty simply because he was present during a conversation. The harmfulness of the error was compounded because, at the jury's request, Roberts' testimony was read back to them during their deliberations. (R. 289-290) Only

Roberts' testimony was read back to the jury.

D. WHERE THE DISTRICT JUDGE CLEARLY INDICATED THAT HE DID NOT BELIEVE AN IMPORTANT WITNESS WHOSE TESTIMONY WAS FAVORABLE TO THE DEFENSE, THE DEFENDANT WAS PREJUDICED.

The government attempted to use Roberts to show that David Llaguno was part of a conspiracy and that he did obtain dynamite. (R. 204-206 and 213-214) Roberts, however, did not testify to those facts. (R. 204-206 and 211-218) At the conclusion of his testimony the district judge asked him the following questions:

> You just came in before this Court and this clerk administered an oath to you and swore you to tell the truth under oath, you understand that? (R. 219) Do you understand that if you lie on this witness stand that you can be separately prosecuted for the crime of perjury or for the crime of giving a false statement to a federal official, that federal official being me? Do

> you understand that? (R. 219) Now so I assume if you understand that oath that your testimony here today is the truth? (R. 219) Well, would you like to reconsider any part of your testimony and correct anything that you have said? (R. 220) You don't have anything else to say. You realize that your testimony here is very important...do you understand that? (R. 220) And you are willing to stand on the testimony that you have told this jury and me? (R.220) You understand that you have been sworn to tell the truth? (R.220)

This series of questions clearly and improperly informed the jury that the judge did not believe Roberts.

Roberts was an important witness. Roberts impeached Charles Daniels for perjurying himself during the trial by denying that he had supplied dynamite to anyone at any time other than in the occurrence alleged in the present case. (R. 82, 88 and 198-199)

Roberts was also important because he did not corroborate that David Llaguno participated in the alleged conspiracy. Moreover, as noted above, Roberts'

testimony had special significance because it is the only testimony which the jury wanted to have read back during its deliberations and because it was read back as requested. (R. 289-290)

Although a judge may, in a limited manner, comment on the evidence, he exceeds those limits when he does so in a way which is "one-sided or which adds to the evidence." Quercia v. United States, 289 U.S. 466, 470, 53 S.Ct. 698, 699 (1933). A judge's privilege to comment on the evidence has inherent limitations. Quercia, supra. Nothing should be said which would "preclude a fair and dispassionate consideration of the evidence." Quercia, supra. (289 U.S. at 472, 53 S.Ct. at 700). In Quercia the Supreme Court cautioned that a judge's lightest word or intimation is received with deference, and may prove controlling." (289 U.S. at 470, 53 S.Ct. at

699).

The series of questions that the trial judge asked Roberts at the end of his testimony left no doubt that the judge did not believe Roberts. No other witness received such treatment, or was questioned at all by the district judge, even though both of the Daniels brothers admitted committing perjury. This interfered with the jury's role to judge credibility as the trier of fact and thereby deprived David Llaguno of his right to a fair trial by jury.

United States v. Kemp, 504 F.2d 421 (6th Cir. 1974) presented a situation very similar to that in the case at bar. In Kemp a key government witness did not testify as the prosecution had expected. The witness was then impeached by a prior inconsistent statement. When the witness attempted to explain away the prior statement the district judge commented

in the jury's presence that he did not believe the witness' explanation. The Kemp Court's holding was clear and succinct. It stated that:

> We, of course, find the Court's comments to be highly improper and hold that such conduct can never be condoned. 504 F.2d at 423.

Accordingly, the Kemp court reversed the convictions on those counts which were the subject of the witness' testimony.

In the case at bar, as in Kemp, the trial judge's actions improperly interfered with the jury's decision making process. Accordingly, the defendant was denied a fair trial.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

Burton Joseph
134 N. LaSalle Street
Chicago, Illinois 60602
(312) 346-9270

Joseph A. Ettinger
Rick M. Schoenfield
Ettinger & Schoenfield, Ltd.
180 N. LaSalle Street
Chicago, Illinois 60601
(312) 782-8435
Attorneys for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

-versus-

DAVID LLAGUNO,

Appellant

NO. 83-5128

United States Court of Appeals for the Fourth Circuit
Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Charles H. Haden II, District Judge.
(CR 83-20008-02)

Argued: January 13, 1984

Decided: February 29, 1984

Before RUSSELL and ERVIN, Circuit Judges, and ROSENN, Senior Circuit Judge for the Third Circuit, sitting by designation.

Rick M. Schoenfield (Joseph A. Ettinger, Donna R. Lipshutz, Ettinger & Schoenfield, Ltd. on brief) for Appellant; Larry R. Ellis, Assistant United States Attorney (David A. Faber, United States Attorney, Marye L. Wright, Assistant United States Attorney, Ruth Lynette Ranson, Assistant United States Attorney on brief) for Appellee.

PER CURIAM:

David Llaguno appeals his conviction after a jury trial of one count of conspiracy to receive stolen explosives, under 18 U.S.C. § 371; one count of receiving stolen explosives, under 18 U.S.C. §§ 842(h) and 844(a); one count of unauthorized interstate transportation of explosives, under 18 U.S.C. §§ 842 (a)(3)(A) and 844 (a), and with aiding and abetting in the last two counts, under U.S.C. § 2. [1] The grounds of his appeal are insufficiency of evidence and certain

trial rulings. We find no merit in Llaguno's allegations that the evidence was insufficient to convict him, or in his claim of prejudicial error during trial. We affirm.

The defendant's contention that the evidence was insufficient to support his convictions relates to the proof of his knowledge that the dynamite he received and transported was stolen and of the interstate transportation of such dynamite. The proof of these critical elements of his offenses was circumstantial but the circumstantial proof was clearly sufficient to sustain the convictions.

---

1 Roy Maldonado and Charles Daniels and William Daniels were indicted with the defendant. The Daniels defendants pled guilty. Maldonado was a fugitive until apprehended immediately prior to Llaguno's trial. His case was, therefore, severed from Llaguno's case.

The proof of the conversation between Llaguno and William Daniels who obtained the dynamite for the defendant was in itself adequate to support a reasonable inference that the dynamite was stolen. Moreover, the dealings between William Daniels, who worked for the Peter White Coal Company, and Llaguno, were carried on under suspicious circumstances. The defendant drove 1600 miles (round trip), through two or three States, beginning his journey from Chicago at midnight, to obtain, in a fairly remote village in West Virginia, dynamite from a miner who was not a regular dealer in dynamite. All of these circumstances, taken together, were sufficient to support a finding of knowledge on the part of the defendant.

The evidence of interstate transportation was even clearer. There seems no dispute that the defendant had ac-

quired the dynamite in West Virginia. The defendant, however, testified that, before he reached the State line on his return to Chicago, he stopped and, afraid of a possible explosion, removed the dynamite from the trunk of his car and threw it away. It is in the defendant's argument that this evidence was not contradicted and that it must be accepted as true. However, there are very definite circumstances in the record which indicate that the defendant's testimony was concocted and lacked credibility. If the defendant had been so frightened of traveling with dynamite in his car, as he testified, it is difficult to understand why he had determined incontinently at twelve o'clock at night to travel 1600 miles to procure the dynamite and, having procured it, boldly to have placed it in the trunk of his car and to have driven

to a point somewhere before the State line, where something prompted him suddenly to be so obsessed with fear and foreboding that he hastened to throw away the dynamite. Moreover, the defendant's story fails to answer the testimony of a witness that, when the defendant returned from West Virginia, he (the witness) received a stick of the dynamite brought back from West Virginia. Where did that dynamite come from if not from West Virginia? There was no evidence that defendant had acquired dynamite other than that purchased in West Virginia. It is only reasonable to assume that the dynamite which the defendant's friend in Chicago received after the defendant's return from West Virginia was a part of the dynamite procured in West Virginia and transported from West Virginia to Illinois. There manifestly was

sufficient evidence to support a finding that the defendant had transported dynamite across state lines.

Finally, Llaguno's contentions that prejudicial error occurred when the prosecutor and the district judge questioned a witness are entirely meritless. The prosecutor's improper question was corrected immediately by a strong curative instruction to the jury by the court. The district judge's own questions to the witness were within his discretion, but even if they did impeach the witness's credibility somewhat, it would not have prejudiced Llaguno, since the witness's testimony, if accepted, was in general more helpful to the Government, whose witness he was.

The judgments of convictions are accordingly

AFFIRMED.